

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pasadena Neighborhood Coalition,

Complainant,

vs.

Altrio Communications, Inc.,

Defendant.

Case 02-11-053
(Filed November 19, 2002)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION TO DISMISS**

Summary

The motion to dismiss filed by defendant Altrio Communications, Inc. (Altrio) is denied because material facts remain in dispute in this proceeding.

Background

Complainant Pasadena Neighborhood Coalition (Coalition) alleges that Altrio is in violation of the requirements of Decision (D.) 01-07-022 (July 12, 2001), which granted Altrio a limited Certificate of Public Convenience and Necessity (CPCN) to provide competitive local exchange services in communities in Los Angeles, Orange, and Ventura counties, utilizing resale of other carriers' services or unbundled network elements (UNEs) and equipment installed solely within existing buildings or structures. The Coalition alleges that Altrio has constructed facilities in Pasadena for its telephone services without returning to

the Commission for approval of a full facilities based CPCN, including submission of a proponent's environmental assessment (PEA) so that the Commission may evaluate the proposed construction pursuant to the California Environmental Quality Act (CEQA), Pub. Res. Code § 21000 *et seq.* The activities objected to by the Coalition include: constructing utility cabinets containing small batteries and gas-powered back-up generators, as well as the associated distribution nodes; hanging cable from existing utility poles; and building new underground conduits (together, the disputed construction).¹ The Coalition seeks an order that Altrio stop work on the disputed construction and submit a PEA for past and proposed construction on its system in Pasadena.

Altrio asserts that it is in compliance with its limited facilities-based (LFB) CPCN because the disputed construction is authorized by Altrio's agreement with the City of Pasadena, granting Altrio nonexclusive rights to construct an Open Video System (OVS) in Pasadena. Altrio states that it is not required to seek or obtain further approval from the Commission, since Pasadena's authorization of the disputed construction, including a determination that the OVS project is exempt from CEQA, is based on its independent authority over the OVS franchise.

Altrio filed a motion to dismiss the complaint on February 24, 2003. At the suggestion of the administrative law judge at the prehearing conference on February 28, 2003, counsel for Altrio agreed to hold the motion in abeyance, reserving the right to request a decision on the motion prior to the evidentiary hearing (EH). By letter dated March 26, 2003, counsel for Altrio requested that

¹ This list includes activities identified by the Coalition, but is not intended to be exhaustive.

the motion to dismiss be decided. After considering the Coalition's objections to the request, the ALJ set a schedule for briefing on the motion to dismiss.

Discussion

Altrio's basis for seeking dismissal is its assertion that the disputed construction was authorized by Pasadena pursuant to its exclusive authority over Altrio's OVS franchise, independent of any action by the Commission. Altrio also asserts that Pasadena decided that the disputed construction was exempt from review under CEQA, thus rendering irrelevant any claim that Altrio should file a PEA or that the Commission should undertake CEQA review of the disputed construction.

The Coalition opposes the motion on two grounds. It asserts that material facts remain in dispute. It also argues that, even if Altrio is correct that Pasadena approved the disputed construction and properly found it exempt from CEQA, the issue of Altrio's noncompliance with the requirements of D.01-07-022 is not resolved by Pasadena's actions.

The Commission treats a motion to dismiss essentially as a trial court would treat a motion for summary judgment. The Commission is thus required to decide whether the party bringing the motion is entitled to prevail, based solely on undisputed facts and matters of law. *State of California Department of Transportation v. Crow Winthrop Development Limited Partnership*, D. 01-08-061, 2001 Cal. PUC LEXIS 512.

In this proceeding, material facts remain in dispute, precluding dismissal. The most prominent of these are the related questions whether Altrio has built new facilities for its telephone service, or facilities not authorized by its OVS franchise authority. Even on Altrio's theory of the case, if there are newly constructed facilities that support or are required for the provision of telephone

service, but not for other services provided by the OVS system, there may be a violation of Altrio's LFB CPCN, as alleged by the Coalition. Altrio has asserted that there are no such facilities, but those assertions have not been subject to cross-examination or to the production of countervailing evidence. The Coalition, through extensive and vigorously contested discovery, is pursuing this point, and others related to it, and can be expected to address it at the EH.

The prematurity of the motion to dismiss is highlighted by Altrio's submissions in support of it. Altrio has made detailed factual assertions about its OVS system in the body of the motion, prior to the completion of discovery that could allow the Coalition to challenge or contradict those assertions. Altrio also has submitted seven documents in support of the motion. Three of the documents were appended to Altrio's Reply, to which the Coalition could not respond. Although these assertions and documents may, if made part of the record at the EH, ultimately provide a basis for factual findings in this proceeding, they can not at this point be accepted as statements of undisputed facts that can ground dismissal of the complaint.²

It is unnecessary to review all possible factual disputes at this stage of the proceeding, since the dispute related to telephone-only construction is sufficient to require denial of the motion to dismiss. It is thus also unnecessary to resolve the legal issues disputed by the parties, and this Ruling should not be read to express any views on them.

² For these reasons, Altrio's suggestion in its Reply that the issues identified in the Scoping Memo be limited prior to the EH is also premature.

IT IS RULED that the motion to dismiss filed by Altrio Communications, Inc. is denied.

Dated May 15, 2003, at San Francisco, California.

/s/ ANNE E. SIMON

Anne E. Simon
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion to Dismiss on all parties of record in this proceeding or their attorneys of record.

Dated May 15, 2003, at San Francisco, California.

/s/ HELEN FRIEDMAN
Helen Friedman

N O T I C E

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